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EU Law News

A bi-monthly review of EU legal developments

affecting business in Europe

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Newsletter September/October 2017

Commission opens in-depth investigation into UK tax scheme

On 26 October 2017 the Commission started investigating a UK scheme that exempts certain transactions by multinational groups from the application of the UK rules targeting tax avoidance. The UK's Controlled Foreign Company (CFC) rules aim at preventing UK companies from using a subsidiary, based in a low or no tax jurisdiction, to avoid taxation in the UK. The CFC rules allow the UK tax authorities to reallocate all profits artificially shifted to an offshore subsidiary back to the UK parent company, where it can be taxed accordingly.

Since 1 January 2013 however, these CFC rules include the Group Financing Exemption for certain financing income, i.e. interest payments received on loans within multinational groups active in the UK. Generally speaking, financing income is often used as a channel for profit shifting. This exemption allows a multinational active in the UK to provide financing to a foreign group company via an offshore subsidiary. The multinational pays little or even no UK tax on the profits from these transactions, because the offshore subsidiary pays little or no tax on the financing income in the country where it is based; and, due to the exemption, the offshore subsidiary's financing income is also not or only partially reallocated to the UK for taxation.

The Commission will investigate whether the Group Financing Exemption complies with EU state aid rules which ensure Member States do not give some companies a better tax treatment than others.

Approval of €1.83bn grant to La Banque Postale

On 24 October 2017 the Commission concluded that the compensation of €1.83bn granted by the French state to La Banque Postale over six years to facilitate citizen's access to banking services is in compliance with EU state aid rules.

The "Livret A" is an instant-access regulated and interest-bearing savings account. The interest is exempt from income tax and all banks can offer it. Since 2009, the French authorities have imposed a number of additional obligations on La Banque Postale linked to the distribution of the "Livret A". Its purpose is to facilitate access to banking services by a significant number of economically disadvantaged citizens.

Since 1 January 2015, under the new agreement, La Banque Postale is required to deliver three services: to open a "Livret A" free of charge for all clients who request it; to offer free of charge banking services at all its branches, such as free cash deposits and withdrawals, including these services when provided for very low amounts; and to maintain a territorial presence in areas where other banks have little presence. La Banque Postale receives compensation from the French state which for the period 2015-2020 is estimated at €1.83bn. The Commission found that this compensation does not exceed the net cost of discharging these public service obligations. There is also a procedure in place requiring La Banque Postale to repay any excess compensation to the French state.

Commission targets Luxembourg on €250m tax benefits to Amazon

On 4 October 2017 the Commission concluded that Luxembourg granted undue tax benefits to Amazon of around €250m because it allowed Amazon to pay substantially less tax than other businesses. Luxembourg must now recover the amount of the benefits.

Following its investigation launched in October 2014, the Commission concluded that a tax ruling issued by Luxembourg in 2003, and prolonged in 2011, lowered the tax paid by Amazon in Luxembourg without any valid justification. The tax ruling enabled Amazon to shift the vast majority of its profits from Amazon EU, a company that is subject to tax in Luxembourg, to a holding company which is not subject to tax. In effect, the ruling endorsed the payment of a royalty to Amazon Europe Holding Technologies, which significantly reduced Amazon EU's taxable profits. The Commission's investigation showed that royalty payments did not reflect economic reality. The holding company has no employees, offices and business activities, whereas Amazon EU has 500 employees, runs Amazon's European retail business and adapts the technology and software behind the Amazon e-commerce platform in Europe. Amazon EU also invests in marketing and gathered customer data.

The royalty payments exceeded, on average, 90% of the operating company's profits. This was significantly more than what the holding company needed to pay to Amazon in the US. It reduced the operating company's taxable profits to a quarter of what they were in reality. As a result, almost three quarters of Amazon's profits were not taxed compared to local companies subject to the same national tax rules.

Commission welcomes new anti-dumping methodology

On 3 October 2017 negotiators of the European Parliament and the Council reached agreement on the Commission's proposal of November 2016 to change the EU's anti-dumping and anti-subsidy legislation.

A new methodology will be introduced for calculating dumping margins for imports from third countries in case of significant market distortions or a state's influence on the economy. The agreement also includes changes which strengthen the EU anti-subsidy legislation so that any new subsidies revealed in the course of an investigation can be reviewed and included in the final duties imposed. In determining distortions several criteria will be considered, such as state policies and influence, the widespread presence of state-owned enterprises, discrimination in favour of domestic companies and the lack of independence of the financial sector. The Commission may draft reports for countries or sectors where it will identify distortions. When filing complaints an industry would be able to rely on such Commission reports to make their case concerning countries where distortions could exist.

The legislation is expected to enter into force by the end of 2017. There is a transition period during which all anti-dumping measures currently in place as well as ongoing investigations will remain subject to the existing legislation.

Scania fined €880m for truck manufacturing cartel

On 27 September 2017 the Commission imposed a fine of €880m on Scania. Together with five other truck manufacturers Scania formed a cartel from 1997 until 2011 covering truck pricing and the costs of meeting stricter emission rules.

In July 2016 the Commission had reached a settlement decision concerning the trucks cartel with MAN, DAF, Daimler, Iveco and Volvo/Renault. Scania decided not to settle. The cartel affected very substantial numbers of road hauliers in Europe because the companies in the cartel produced more than 9 out of every 10 medium and heavy trucks sold in Europe. The meetings were held at senior manager level, sometimes at the margins of trade fairs or other events and by phone conversations. From 2004 its German subsidiaries engaged in exchanging information electronically.

The Commission's investigation revealed that the cartel coordinated prices at "gross list" level for medium and heavy trucks in the European Economic Area. This level is the basis for pricing of trucks paid at national and local level. The cartel also colluded on the timing for the introduction of technologies to comply with the increasingly strict European emissions standards. The cartel finally discussed the passing on to customers of the costs for these emissions technologies. The Commission's investigation did not reveal any links between this cartel and circumventing the anti-pollution system of certain vehicles.

European Court rules on concentration through joint ventures

On 7 September 2017 the European Court of Justice (ECJ) delivered the judgment on a request (C-248/16) for a preliminary ruling by the Austrian Supreme Court on the interpretation of the EU Merger Regulation EC 139/2004. The ECJ clarified that a change from sole to joint control over an existing undertaking is a notifiable concentration under the Merger Regulation only if the joint venture created by such a transaction performs on a lasting basis all the functions of an autonomous economic entity.

Austria Asphalt GmbH & Co. OG is a subsidiary of Strabag SE, an international construction group operating in particular in the field of road networks. Teerag Asdag AG which also belongs to a road-building international construction group is the sole owner of the Mürzzuschlag asphalt mixing plant ('the target undertaking'), which manufactures asphalt used in road construction. Austria Asphalt notified the Austrian Federal Competition Authority of its acquisition of 50% of the shares in this existing asphalt mixing plant. Teerag Asphalt would keep the other 50% of the shares. The asphalt mixing plant would supply mostly to its parent companies and had only supplied its sole parent company Teerag Asphalt before the transaction.

The ECJ interpreted Article 3 of the Merger Regulation on the control of concentrations between undertakings. The ECJ ruled that the article must be interpreted as meaning that a concentration is deemed to arise upon a change in the form of control of an existing undertaking which, previously exclusive, becomes joint, only if the joint venture created by such a transaction performs on a lasting basis all the functions of an autonomous economic entity. The ECJ does not make a distinction between a newly created joint venture and a joint venture that results from a change from sole to joint control. The entity must exist in the relevant market and therefore qualify as a full-function joint venture.

The ECJ deviated therefore from the European Commission's view that a transaction involving a change in the form of control over an existing undertaking is always a concentration, regardless of whether the joint venture is full-function or not. Consequently, if the joint venture created by the parties does not qualify as full-function joint venture, the European Commission has no jurisdiction under the EU Merger Regulation. Rather, the laws of the EU member states apply. These may require a merger control approval by a national competition authority or even several approvals by several national competition authorities.

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